Supreme Court, U.S.
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80-969

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO.

GEORGE FIRESTONE, as Secretary of State of Florida, DOROTHY GLISSEN, as Director of Division of Elections, State of Florida, and ROBERT HART, Chairman of Florida Elections Commission, ANNE KELLY, ROBERT HUCKSHORN, SAMUEL SHORESTIN and FLORENCE NEIDIG, Members of Florida Elections Commission.

Petitioners,

vs.

DADE VOTERS FOR A FREE CHOICE, a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT (A) CONFLICTS WITH THE OPINION OF THE SUPREME COURT OF CALIFORNIA IN CITIZENS AGAINST RENT CONTROL V. CITY OF BERKELEY, 167 Cal.Rptr. 84 (1980), IN THAT THE TWO CASES REACH OPPOSITE CONCLUSIONS ON THE QUESTION OF WHETHER IT IS CONSTITUTIONALLY VALID UNDER THE FIRST AMENDMENT TO RESTRICT THE AMOUNT OF CONTRIBUTIONS TO POLITICAL COMMITTEES IN THE CONTEXT OF REFERENDUM ELECTIONS, AND; (B) DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, IN THAT THE QUESTION SET FORTH ABOVE, PRESENTED BY THIS CASE, IS AN ISSUE WHICH HAS BEEN LEFT OPEN BY THIS COURT, WHICH IS OF SIGNIFICANT IMPORTANCE AND WHICH HAS WIDESPREAD RAMIFICATIONS?

QUESTIONS PRESENTED CONTINUED

II

WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT IT SANCTIONS THE ISSUANCE OF AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE CRIMINAL STATUTE IN A SITUATION IN WHICH THE STATE OFFICIAL WITH THE SOLE AUTHORITY TO BRING CRIMINAL CHARGES WAS NOT MADE A PARTY TO THE PROCEEDING, THEREBY MAKING IT IMPOSSIBLE TO DETERMINE WHETHER A STATE PROSECUTION WAS LIKELY, OR EVEN REMOTELY POSSIBLE, AND IN WHICH THERE IS NO SHOWING AT ALL OF ANY GENUINE THREAT OF ENFORCEMENT OF THE STATUTE?

PARTIES TO PROCEEDING

All parties to this proceeeding are contained in the caption of the case.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Florida in this cause is unreported. The opinion of United States Court of Appeals, Fifth Circuit, is reported as Dade Voters for a Free Choice v. Firestone, 621 F.2d 195 (5th Cir. 1980). The opinion deals both with this case and a consolidated case, Let's Help Florida v. McCrary, which, as reported, is the lead case.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the judgment and opinion of the United States Court of Appeals, Fifth Circuit, entered July 11, 1980. (A. 1-21). A timely petition for rehearing was denied on September 10, 1980. (A. 60-61).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Florida Statutes § 106.08(1).

> 106.08 Contributions; limitations on.--
>
> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> (a) To a candidate for countywide office or to a candidate in any election conducted on less than a countywide basis, $1,000.
>
> (b) To a candidate for legislative or multicounty office, $1,000.
>
> (c) To a candidate for statewide office, $3,000.

(d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000.

(e) To any political committee in support of, or in opposition to, an issue to be voted on in a countywide, districtwide, or less than countywide election, $1,000.

(f) To a political committee supporting or opposing one or more candidates, $1,000.

(g) To a candidate for county court judge or circuit judge, $1,000.

(h) To a candidate for retention as a judge of a District Court of Appeal, $2,000.

(i) To a candidate for retention as a justice of the Supreme Court, $3,000.

STATEMENT OF THE CASE

Plaintiffs instituted a proceeding in the United States District Court for the Northern District of Florida seeking an injunction against the enforcement of a Florida statute restricting the amount of money a person, natural or corporate, or political committee may contribute to a political committee in support of or in opposition to an issue being voted upon in a referendum election. The statute provides that its violation shall constitute a criminal offense. Nonetheless, Plaintiffs did not make the State Attorney, the only person in Florida with the authority to bring criminal charges, a party to the suit.

The district court granted relief and Defendants appealed. The case was consolidated with an appeal in the case of Let's Help Florida v. McCrary. The United States Court of Appeals, Fifth Circuit, affirmed, holding that (a) a case or controversy did exist and federal abstention was inappropriate since

Defendants did not disavow enforcement of the statute (The court did not address the fact that the State Attorney was not made a party to the suit), and (b) the statute was unconstitutional as an impermissible abrigement of First Amendment rights.

The present proceeding follows. Defendants are also seeking review of the same decision presented here in an appeal taken in the consolidated case of Let's Help Florida v. McCrary. Certiorari is being utilized in the present case because of the existence of a second issue not presented by Let's Help Florida v. McCrary, which could not be raised if this case had proceeded by appeal. 28 U.S.C. § 1254(2).

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

For the reasons set forth in the argument portion of this brief, it is Defendants' position that there was no jurisdiction for consideration by the court of first instance in this cause. Jurisdiction was asserted by Plaintiffs, however, under 28 U.S.C. § 1331, 1342 and 42 U.S.C. § 1983.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES, FIFTH CIRCUIT (A) DOES CONFLICT WITH THE OPINION OF THE SUPREME COURT OF CALIFORNIA IN CITIZENS AGAINST RENT CONTROL V. CITY OF BERKELEY, 167 Cal.Rptr. 84 (Cal. 1980), IN THAT THE TWO CASES REACH OPPOSITE CONCLUSIONS ON THE QUESTION OF WHETHER IT IS CONSTITUTIONALLY VALID UNDER THE FIRST AMENDMENT TO RESTRICT THE AMOUNT OF CONTRIBUTIONS TO POLITICAL COMMITTEES IN THE CONTEXT OF REFERENDUM ELECTIONS, AND; (B) DID DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, IN THAT THE QUESTION SET FORTH ABOVE, PRESENTED BY THIS CASE, IS AN ISSUE WHICH HAS BEEN LEFT OPEN BY THIS COURT, WHICH IS OF SIGNIFICANT IMPORTANCE AND WHICH HAS WIDESPREAD RAMIFICATIONS.

The decision of the United States Court of Appeals, Fifth Circuit, is in clear and direct conflict with the decision of the Supreme Court of California in Citizens Against Rent Control v. City of Berkeley, 167 Cal.Rptr. 84 (Cal. 1980), thus forming a basis for the

invocation of this Court's jurisdiction. United States Supreme Court Rule 17.1(a) lists as a basis for the possible grant of review by certiorari, "[w]hen a federal court of appeals has . . . decided a federal question in a way in conflict with a state court of last resort. . . ." In addition, a basis for jurisdiction exists because the appellate court here "has decided an important question of federal law which has not been, but should be, settled by this Court . . ." United States Supreme Court Rule 17.1(c).

In the present case, the Fifth Circuit found unconstitutional Florida Statutes §§ 106.08(1)(d) and 106.08(1)(e) which impose limitations on the amount of money that any person, natural or corporate, or political committee may contribute to a political committee in support of or in opposition to an issue being voted upon in a referendum election. The court held that the statutory provisions in question "abridge important first amendment rights and are ill-suited for preventing corruption or for promoting disclosure." 621 F.2d at 201. (A. 21).

In Citizens Against Rent Control v. City of Berkeley, supra, the California Supreme Court dealt with a city ordinance which imposed the same manner of limitation on contributions as did the Florida statutes dealt with in the present case. The court found the ordinance to be valid, stating:

> We hold above that large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; in light of this conclusion, restricting the size of such contributions "focuses precisely on the problem." (Buckley [v. Valeo], 424 U.S. [1] at p. 28, 96 S.Ct. at p. 639 [1976].) We reject, as the Buckley court did, the argument that mere disclosure of contributions is sufficient for this purpose. (Id. at pp. 27-28, 96 S.Ct. at pp. 638-39.) As with the measure at issue in Buckley, the contribution limitation in section 602 does not interfere with other ways of engaging in political activity, but restricts the one means that represents a danger rather than an aid to the electoral process.
>
> 167 Cal.Rptr. at 91.

There can really be little dispute that the two opinions conflict. Indeed, the dissent in Citizens Against Rent Control specifically noted that the opinion in the present case conflicted with the court's holding in Citizens Against Rent Control. 167 Cal.Rptr. at 94-95. Moreover, one of the cases relied upon in the decision presently under review was the lower appellate court opinion, Citizens Against Rent Control v. City of Berkeley, 99 Cal.Rptr. 448 (Ct.App. 1st Dist. 1979), reversed by the California Supreme Court in Citizens Against Rent Control. 621 F.2d at 200. (A. 17).[1]

Given the conflict, Defendants submit that this Court should grant jurisdiction. Clearly, the issue presented

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[1]Review has been sought in this Court of the decision in Citizens Against Rent Control. The appellants therein have asserted conflict with the opinion in the present case. Citizens Against Rent Control v. City of Berkeley, case no. 80-737, Appellants' jurisdictional statement, pp. 20-21.

is one that will be presented by statutes and ordinances throughout the nation. Allowing this conflict to remain unresolved will only perpetuate confusion in this area of the law.

Further, the import of the issue is readily apparent, as is the fact that it is an issue which should logically be considered at this time, as a natural matter to be decided subsequent to this Court's decisions in Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

In Buckley, this Court struck down limitations on expenditures, but sanctioned limitations on contributions, in the context of candidate elections. Then, in Bellotti, this Court declared unconstitutional a Massachusetts statute which prohibited coporations from making expenditures for the purpose of influencing the vote on questions submitted to the voters. This Court, however, left open the question of the constitutionality of

laws prohibiting or limiting contributions to political committees, the very question presented here. 435 U.S. at 787, n. 26. It thus appears that the issue presented here is a logical outgrowth of Buckley and Bellotti which needs to be dealt with by this Court.

Based, therefore, upon the fact that a logical progression of issues calls for review, the fact that clear conflict exists and the import and widespread ramifications of the issue, Defendants submit that this Court should grant certiorari jurisdiction in this cause.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION IN THAT IT SANCTIONS THE ISSUANCE OF AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE CRIMINAL STATUTE IN A SITUATION IN WHICH THE STATE OFFICIAL WITH THE SOLE AUTHORITY TO BRING CRIMINAL CHARGES WAS NOT MADE A PARTY TO THE PROCEEDING, THEREBY MAKING IT IMPOSSIBLE TO DETERMINE WHETHER A STATE PROSECUTION WAS LIKELY, OR EVEN REMOTELY POSSIBLE, AND IN WHICH THERE IS NO SHOWING AT ALL OF ANY GENUINE THREAT OF ENFORCEMENT OF THE STATUTE.

In rejecting contentions regarding the lack of federal jurisdiction due to the lack of case or controversy and the appropriateness of the federal abstention doctrine, the appellate court relied primarily upon the fact that the state official defendants in this case have not disavowed any intention of enforcing the challenged statute and that the plaintiffs' fear of prosecution is therefore not imaginary or wholly speculative.

621 F.2d at 198. (A. 9). In reaching this conclusion, the court's reasoning conflicts with a number of opinions of this Court regarding federal jurisdiction, primarily because none of the Defendants have the authority under Florida law to prosecute the plaintiffs, or anyone else for that matter.

Under Florida law, the decision as to what criminal charges are to be brought is one made solely by the State Attorney, the prosecuting authority for the State. State ex rel. Hardy v. Blaunt, 261 So.2d 172 (Fla. 1972); State v. Mack, 187 So.2d 918 (Fla. 2d DCA 1966); DiBona v. State, 121 So.2d 192 (Fla. 2d DCA 1960). In the present case, the State Attorney was not made a party to the proceeding.

Thus, there is simply no way of knowing what the State's intentions would have been regarding prosecution. The State Attorney may very well have disavowed any intent to prosecute, as did, for instance, the prosecutors in

St. Martin's Press, Inc. v. Carey, 605 F.2d 41 (2d Cir. 1979), where such action was held to preclude federal intervention. Under the facts here, therefore, the lack of a specific disavowel of the intent to prosecute, the appellate court's primary reason for rejecting the defendants' position and a major factor relied upon by this Court in reaching a similar conclusion in Babbitt v. United States, 442 U.S. 289 (1979), is not a proper factor to consider. Plaintiffs' failure to make the State Attorney a party precluded the possibility of any such statement being made. Given this fact, a conclusion that prosecution would have been likely, or even reasonably foreseeable, can only be said to be speculation.

The situation is thus similar to that dealt with in Younger v. Harris, 401 U.S. 37 (1971), not as regards the most well known aspects of Younger, the requirement that federal courts not interfere in ongoing state criminal prosecutions, but as regards the disposition of Younger relevant to the three plaintiffs other than Harris against whom no criminal charges were pending.

Whatever right Harris, who is being prosecuted under the state syndicalism law may have, Dan, Hirsch, and Broslavsky cannot share it with him. If these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true--either on the admission of the State's district attorney or on any other evidence--then a genuine controversy might be said to exist. But here appellees Dan, Hirsch, and Broslawsky do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible. They claim the right to bring this suit solely because, in the language of their complaint, they "feel inhibited." We do not think this allegation even if true, is sufficient to bring the equitable jurisdiction of the federal courts into play to enjoin a pending state prosecution. A federal lawsuit to stop a prosecution is a serious matter. And persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases. See Golden v. Zwickler, 394 U. S. 103 (1969).

401 U.S. at 42.

See also United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 at 89-90 (1947).

These sentiments apply equally here. There exists no case or controversy and the appellate court's decision therefore conflicts with the above decisions of this Court.

For the same reasons, the federal abstention doctrine applies here. The appellate court cited Steffel v. Thompson, 415 U.S. 452 (1974), for the proposition that the abstention principles of Younger are inapplicable when no state prosecution is pending. 621 F.2d at 199. (A. 11). While it is true that Steffel allows for review under certain circumstances, it is important to realize that these circumstances require the demonstration of "a genuine threat of enforcement." 415 U.S. at 475. Here, since, as previously detailed, there is no way of knowing what position would be taken by the only person with the authority to bring criminal charges, this requirement cannot be said to have

been met. The appellate court's opinion therefore is in conflict with this Court's opinion in Steffel.

In essence, the decision here has done away with the federal abstention doctrine in all but situations in which a state prosecution is pending. Such a significant departure from the standard established by this Court that there exist a genuine threat of enforcement of a challenged state statute is a matter which is of such import as to warrant this Court's review. Moreover, this departure conflicts with the numerous cases cited herein regarding both case and controversy and premature intervention. Jurisdiction should therefore be granted. United States Supreme Court Rules 17.1(a) and (c).

CONCLUSION

Based upon the foregoing argument, Petitioners submit that this Court should grant a writ of certiorari in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition was served upon TALBOT D'ALEMBERTE & DONALD M. MIDDLEBROOKS, Steel, Hector & Davis, 1414 Southeast First National Bank Building, Miami, Florida, 33131, and STEVEN J. UHFELDER, Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahassee, Florida, 32302, this ___ day of December, 1980.

ANTHONY C. MUSTO
Assistant Attorney General
Chief Counsel, Miami Division

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IN THE
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GEORGE FIRESTONE, as Secretary of State of Florida, DOROTHY GLISSEN, as Director of Division of Elections, State of Florida, and ROBERT HART, Chairman of Florida Elections Commission, ANNE KELLY, ROBERT HUCKSHORN, SAMUEL SHORESTIN and FLORENCE NEIDIG, Members of Florida Elections Commission.

Petitioners,

vs.

DADE VOTERS FOR A FREE CHOICE, a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Respondents.

APPENDIX

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LET'S HELP FLORIDA, a Political Committee, and Paul M. Bruun, Plaintiffs-Appellees,
v.
Jesse M. McCRARY, Jr., as Secretary of State of Florida, et al., Defendants-Appellants.

DADE VOTERS FOR A FREE CHOICE, a Political Committee, and the Florida Restaurant Association, Inc., Plaintiffs-Appellees,
v.
George FIRESTONE, Secretary of State of Florida, et al., Defendants-Appellants.

Nos. 78-2497, 79-2091

United States Court of Appeals, Fifth Circuit.

July 11, 1980.

Appeals from the United States District Court for the Northern District of Florida.

Before THORNBERRY, FRANK M. JOHNSON, Jr. and HENDERSON, Circuit Judges.

THORNBERRY, Circuit Judge:

In these consolidated cases we must decide whether Florida statutes that restrict the size of contributions to a single political committee in a referendum election violate the first amendment

rights of persons who want to contribute more than the maximum amount allowed by the statutes. Because campaign contributions implicate important first amendment rights and because Florida has shown no sufficiently important interest to justify restricting the contributions in a referendum election, we affirm the district court decisions declaring these statutory restrictions unconstitutional.

I. Facts.

Let's Help Florida is a political committee organized and registered under Florida law for the express purpose of conducting "a public education campaign urging the passage of a constitutional amendment which will legalize casino gambling in Southern Florida." The committee waged a petition drive under the initiative provisions of the Florida

constitution in an effort to place the casino gambling proposal on the ballot in the November 1978 election. The committee does not support any individual candidate.

The Florida legislature enacted a comprehensive election code effective January 1, 1978. Section 106.08(1)(d) of the code restricts the size of contributions to a single political committee like Let's Help Florida:

> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> . . . . .
>
> (d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000.

The election code does not restrict the number of contributions a person can make to different political committees,

nor does the code restrict the total amount of independent direct expenditures that a person can make without control by, coordination with, or consultation with any candidate, committee, or agent thereof. Fla.Stat.Ann. § 106.011(5) (West Supp. 1980). Political committees must disclose a variety of information upon registration. Fla.Stat.Ann. § 106.03 (West Supp. 1980). Committees must also disclose information about all contributors, even those who make very small contributions. Fla.Stat.Ann. § 106.07 (West Supp. 1980). Various civil and criminal penalties apply for violations of the election code.

In February 1978 Let's Help Florida and a person desiring to contribute more than the statutory maximum amount filed suit against the secretary

of state, attorney general, director of the division of elections, and the members of the state elections commission to invalidate section 106.08(1)(d) under the first and fourteenth amendments. In May 1978 the district court issued a decision invalidating the statute on constitutional grounds.

Dade Voters for a Free Choice is a political committee organized and registered under Florida law to oppose passage of an ordinance that would prohibit smoking in public places; the voters considered this proposal in a countywide referendum election in May 1979. The committee does not support any individual candidate. Contributions to the Dade Voters committee were restricted to one thousand dollars by Fla.Stat.Ann. § 106.-08(1)(e) (West Supp. 1980), which applies

to countywide elections in the same way that section 106.08(1)(d) applies to statewide elections.

In February 1979 Dade Voters and a party desiring to contribute more than the statutory maximum amount sued the secretary of state, director of the division of elections, and members of the elections commission to invalidate section 106.08(1)(e) under the first and fourteenth amendments. In March 1979 the district court relied upon its earlier decision in the Let's Help Florida case to strike down the statute.

II. Federal Jurisdiction and Review.

Appellants in the Dade Voters case raise several contentions questioning federal jurisdiction and review. Appellants first contend that the district court lacked jurisdiction because no

case or controversy existed between the parties. The Supreme Court summarized the test to determine whether a case or controversy exists with regard to first amendment rights in Babbitt v. United Farm Workers National Union, 442 U.S. 289, 99 S.Ct. 2301, 2309, 60 L.Ed.2d 895 (1979):

> When the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." Doe v. Bolton, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L. Ed.2d 201 (1973).

In Babbitt the Supreme Court allowed a union to challenge the constitutionality of a state statute regulating election procedures, consumer publicity, and

criminal sanctions, even though no elections or prosecutions had yet occurred. The Court said that

> . . . when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." Steffel v. Thompson, 415 U.S. 452 at 459, 94 S.Ct. 1209 at 1216, 39 L.Ed.2d 505. . . . Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution . . .

99 S.Ct. at 2310-11. The Dade Voters committee wanted to receive larger contributions than the statute allowed. The committee had already received a few contributions larger than the statutory maximum, and other potential donors, including the co-plaintiff in this case, indicated that they would make larger contributions if the law allowed them

to do so. The defendants have the statutory duty to enforce the election code. Fla.Stat.Ann. § 106.22-106.27 (West Supp. 1980). They have not disavowed any intention to enforce the statute. On the contrary, counsel for the defendants said that the state would be compelled to begin proceedings against the plaintiffs if the statute is upheld. Record, Vol. III, at 41-42. These facts show that the plaintiffs' fear of prosecution is not imaginary or wholly speculative, and that a sufficient case or controversy exists to establish federal jurisdiction under Babbitt, and under Fifth Circuit cases such as International Society for Krishna Consciousness v. Eaves, 601 F.2d 809, 817-19 (5th Cir. 1979) and Septum, Inc. v. Keller, 614 F.2d 456, 459 (5th Cir. 1980). This conclusion is not contrary to the Second Circuit opinion in

St. Martin's Press, Inc. v. Carey, 605 F.2d 41 (2d Cir. 1979). In St. Martin's Press the court held that no case or controversy existed when a publisher brought a first amendment challenge to enjoin state prosecutors from enforcing a child pornography statute against a book that was outside the scope of the statute, and against which the prosecutors declared they would not enforce the statute. 605 F.2d at 44-45. In contrast to St. Martin's Press, plaintiffs in this case desire to engage in conduct that is in clear violation of a statute which the state has indicated it will enforce against them.

Appellants also contend that the district court should have abstained from hearing this case under principles announced in Younger v. Harris, 401 U.S.

37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Younger abstention principles are inapplicable to this case, however, because no state prosecution was pending when the plaintiffs filed suit. Steffel v. Thompson, 415 U.S. 452, 475, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974).

Appellants finally contend that the district court should not have issued injunctive relief. A federal court may enjoin state officials from enforcing an unconstitutional statute. Ex parte Young, 209 U.S. 123, 165-68, 28 S.Ct. 441, 456-457, 52 L.Ed. 714 (1908). An injunction is proper in this case because no legal remedy could correct the irreparable injury to plaintiffs' first amendment rights, important for an election only weeks away. See Elrod v. Burns, 427 U.S. 347, 373-74 & n. 29, 96 S.Ct.

2673, 2689-2690, 49 L.Ed.2d 547 (1976) (loss of first amendment rights unquestionably constitutes irreparable injury).

III. First Amendment.

The right to make political contributions is protected under the first amendment as an important freedom of association. Buckley v. Valeo, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976). In Buckley the Supreme Court struck down federal restrictions upon direct political expenditures in candidacy elections, but upheld similar restrictions upon contributions to a candidate or to a committee supporting a candidate. As a general preface to its decision, the Court explained that contributions required less first amendment protection than did direct expenditures:

> A limitation on the amount of money a person may give to a

> candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.
>
> . . . . .
>
> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21-22, 96 S.Ct. at 636.

Even though contributions receive less first amendment protection than do direct expenditures, a state may restrict political contributions only if the state

"demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. at 25, 96 S.Ct. at 638. The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate. 424 U.S. at 26-29, 96 S.Ct. at 638-640. The governmental interest in restricting contributions to candidates is substantial because actual corruption resulting from a candidate's dependence upon large individual contributors would undermine the integrity of representative democracy, and even the appearance of corruption that arises from public awareness of the possibilities for abuse would erode confidence in the democratic system. Id.

The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in Buckley, does not justify restrictions upon political contibutions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers--in this case, the voters themselves--except in a manner protected by the first amendment. The distinction

between the state's interest in regulating a candidacy election and in regulating a referendum election was discussed by the Supreme Court in First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1976). In striking down a Massachusetts statute that prohibited a corporation from making expenditures or contributions for publicity in a referendum election unrelated to the corporation's immediate business, the Court observed that

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections. . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: "The Constitution protects expression which is eloquent no less than that which is unconvincing.'. . . We noted only recently that 'the concept that government

> may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . ."

435 U.S. at 790, 98 S.Ct. at 1423 (footnotes and citations omitted). This distinction between candidacy and referendum elections has been recognized by several other courts in striking down state restrictions upon contributions for referendum elections. See C & C Plywood Corporation v. Hanson, 583 F.2d 421, 424-25 (9th Cir. 1978) (invalidating Montana law that prohibited corporations from making contributions in a referendum election); Citizens Against Rent Control v. City of Berkeley, 99 Cal.App. 3d 736, 160 Cal.Rptr. 448, 451-55 (Ct. App., 1st Dist. 1979) (invalidating city ordinance that restricted the size of contributions in a referendum election);

Schwartz v. Romnes, 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute prohibiting corporate expenditures for political purposes must be construed narrowly under first amendment so that corporations may make contributions in referendum elections). With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Appellants also contend that the restrictions upon the size of contributions to a single committee are necessary to promote adequate disclosure about who is financing a campaign. In the absence of these restrictions, appellants contend that corporations and wealthy individuals would mask their participation in a referendum campaign by funneling large sums of money into a

a committee which the public would see only under an innocuous title such as "Let's Help Florida" or "Dade Voters for a Free Choice." Although promoting disclosure of campaign contributors is an important state interest, the restrictions upon political contributions in sections 106.08(1)(d), (e) cannot be justified as disclosure measures because the statutes are not closely drawn to avoid unnecessary abridgement of associational freedoms. These statutes that restrict the amount a person may contribute to a single committee do little to promote disclosure. The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute.

These multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors.

Florida can and does effectively promote the disclosure of large contritors through measures that are less harmful to first amendment rights. For example, sections 106.03 and 106.07 of the Florida Election Code require political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public and may be published through newspapers and other media. Section 106.143 requires disclosure of the source of payment for all political advertisements and campaign literature. Measures such as these provide adequate

disclosure without directly restricting contributions or other important first amendment rights. See C & C Plywood, 583 F.2d at 425 (rejecting argument that state interest in promoting disclosure justifies prohibition of corporate contributions in a referendum election).

Because the Florida statutes that restrict the size of contributions in a referendum election abridge important first amendment rights and are ill-suited for preventing corruption or for promoting disclosure, we affirm the decision in the court below.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DADE VOTERS FOR A FREE CHOICE,
a Political Committee and
THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Plaintiffs,

vs. TCA 79-0770

GEORGE FIRESTONE, Secretary of
State of Florida; ELIZABETH B.
CASTOR, Director of Division of
Elections, and WALLACE KING, Chair- ORDER
man of Florida Elections Commission,
ANNE E. KELLY, JAMES W. MATTEWS,
BENJAMIN A. JOHNSON, HELEN K. LESLIE,
JAMES McKILLIPS, and ROBERT J. HUCKSHORN,
Members of the Florida Elections
Commission,

Defendants

This is an action challenging the constitutionality of certain portions of Florida's campaign finance act, Florida Statutes Chapter 106. Plaintiff Dade Voters For A Free Choice is a political committee organized and registered pursuant to Florida Statutes §106.03 for the purpose of opposing passage of a "clean indoor air" ordinance to be presented to

the Dade County, Florida electorate at a special election to be held May 8, 1979; it does not support or oppose the election of any candidate for public office. Plaintiff The Florida Restaurant Association, Inc. desires to contribute money and to make in kind contributions in support of the efforts of Dade Voters For A Free Choice. Defendants are the officials of the State of Florida charged with the responsibility of enforcing the campaign financing laws.

The case is presently before the court for a determination whether to enter a final judgment declaring Florida Statutes §106.08(1)(e) unconstitutional and granting permanent injunctive relief to plaintiffs barring enforcement of said statute. All other issues raised in plaintiffs' complaint are reserved for decision at a later date. Plaintiffs were

granted a preliminary injunction on March 5, 1979. At that time a final hearing on the issues relating to the validity of §106.08(1)(e) was scheduled. The parties subsequently stipulated to waive final argument and to "rely upon their prior written memoranda, prior written and oral argument presented to the Court, and other evidence submitted and stipulated to at the hearing held on March 2, 1979 on the plaintiffs' application for a preliminary injunction."

The statutory provision challenged by plaintiffs provides:

> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> . . . .
>
> (d) To any political committee in support of, or in opposition to, an issue to be voted on in a countywide, districtwide, or less than countywide election, $1,000.00.

The complaint alleges that The Florida

Restaurant Association, Inc. wishes to contribute to Dade Voters For A Free Choice in excess of this $1,000.00 cap. In addition, the evidence as stipulated by the parties demonstrates that Dade Voters For A Free Choice has already violated this provision on four occasions by receiving contributions in amounts greatly exceeding the limitation. The plaintiffs therefore possess standing to challenge the restrictions imposed by the statute.

Based upon the evidence and argument adduced at the March 2 hearing, the court concludes that Florida Statutes §106.08 (1)(e) contravenes the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. The reasoning behind this conclusion is amply stated in this court's opinion in Let's Help Florida v. Smathers,

453 F.Supp. 1003 (N.D. Fla. 1978), holding invalid Florida Statutes §106.08(1)(d), which imposes a limitation on contributions to political committees supporting or opposing an issue to be voted on in a statewide election. No party to the present action has come forward with a principled reason for treating §106.08(1)(e) differently from §106.08(1)(d), and the court finds that both provisions suffer from the identical constitutional infirmaries. A judgment will therefore be entered declaring §106.08(1)(e) unconstitutional; since plaintiffs have no adequate remedy at law, permanent injunctive relief will also issue.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Florida Statutes §106.08(1)(e) violates the First and Fourteenth Amendments to the Constitution of the United States. Pursuant

to Rule 54(b), Federal Rules of Civil Procedure, it is hereby determined that there is no just reason for delay. The clerk of the court is directed to enter judgment in favor of plaintiffs and against defendants declaring Florida Statutes §106.08(1)(e) to be unconstitutional and permanently enjoining defendants from enforcing against plaintiffs the contribution limitation contained in said statutory provision.

DONE AND ORDERED this 13th day of March, 1979.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA TALLAHASSEE DIVISION

DADE VOTERS FOR A FREE CHOICE, a Political Committee, and THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Plaintiffs,

vs. TCA 79-0770

GEORGE FIRESTONE, as Secretary of the State of Florida, et al.,

Defendants.

O R D E R

In this action for declaratory and injunctive relief plaintiffs challenge the constitutionality of certain portions of Florida's campaign finance act, Florida Statutes Chapter 106. Plaintiff Dade Voters For A Free Choice is a political committee organized and registered pursuant to Florida Statutes §106.03 for the purpose of opposing

passage of an anti-smoking ordinance to be presented to the Dade County electorate at a special election to be held May 8, 1979; it does not support or oppose the election of any candidate for political office. Plaintiff The Florida Restaurant Association, Inc. desires to contribute money and to make in kind contributions in support of the efforts of Dade Voters For A Free Choice. Defendants are the officials of the State of Florida charged with the responsibility of enforcing the campaign financing laws.

Presently pending is plaintiffs' application for a preliminary injunction. The injunction is sought solely on the issue of enforcement of the contribution and expenditure limitations contained in Florida Statutes §106.08(1)(e).[1]

A hearing was held on March 2, 1979.

Florida Statutes §106.08(1)(e) provides:

> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> > (d) To any political committee in support of, or in opposition to, an issue to be voted on in a countywide, districtwide, or less than countywide election, $1,000.00.

The Florida Restaurant Association, Inc. alleges that it wishes to make a contribution to Dade Voters For A Free Choice in excess of the $1,000.00 cap imposed by this statutory provision.[2] Both plaintiffs contend that this restriction impinges upon First Amendment guarantees made applicable to the states by the Due Process Clause of the Fourteenth

Amendment to the United States Constitution and that its enforcement should therefore be enjoined.

The Fifth Circuit has announced four general prerequisites to the grant of a preliminary injunction: (1) a substantial likelihood that the plaintiff will prevail on the merits; (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant; and (4) granting the injunction will not disserve the public interest. Knights of the KKK, Realm of Louisiana v. East Baton Rouge Parish School Board, 578 F.2d 1122, 1125 (5th Cir. 1978); State of Texas v. Seatrain International, S.A., 518 F.2d 175, 179 (5th Cir. 1975);

Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974).

Upon consideration of the evidence and argument presented at the hearing, the court concludes that plaintiffs have established a substantial likelihood of success on the merits. This conclusion is well nigh dictated by the rationale of this court's opinion in Let's Help Florida v. Smathers, 453 F.Supp. 1003 (N.D. Fla. 1978), in which Florida Statutes §106.08(1)(d) was held to be violative of the First and Fourteenth Amendments. Like §106.08(1)(e), the subsection involved in Let's Help Florida imposed a limitation on contributions to any political committee supporting or opposing an issue to be voted on by the electorate. The only differences

between the two provisions involve the amount of the limitation ($3,000.00 rather than $1,000.00) and the kind of elections to which the limitation applies (statewide rather than countywide, districtwide, or less than countywide elections). There is no basis in constitutional principle for differentiating between the two, for the identical governmental interests are sought to be furthered and the identical free speech and associational interests are curbed.[3] Accordingly, the findings enunciated in Let's Help Florida are expressly adopted herein as demonstrating plaintiffs' likelihood of success on the merits.

Plaintiffs have also satisfied their burden of proof as to the remaining three prerequisites to preliminary injunctive relief. As was stated in the

order granting the preliminary injunction in Let's Help Florida:

> Having determined that this case involves a deprivation of First Amendment rights the element of irreparable harm to plaintiffs is established. As noted by the Supreme Court, the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Conversely, the court perceives no harm to defendants in enjoining enforcement of the questioned provision of the statute. Removal of the contribution limitation as it relates to political committees supporting or opposing an issue in a countywide, districtwide, or less thatn countywide election does not appear to pose any significant threat to the integrity of Florida's election process. Defendants have come forth with no interest served by this statute which would be harmed by a preliminary injunction and elimination of these ceilings may aid in enhancing public awareness of the issues to be decided in the May election. Consequently, the balance of potential harm tips heavily in favor of plaintiffs' First Amendment rights.

> Likewise, the public interest cannot be disserved by allowing unfettered discussion of important issues by promoting the ability of small groups to be effectively heard in the political arena. This is particularly true in a case such as this where there appears to be an absence of any interest sufficiently compelling which has the proper nexus to this statute.

Let's Help Florida v. Smathers, TCA 78-0750 (Order of March 29, 1978), at p. 6.

Thus, all four prerequisites to a preliminary injunction have been met. Although Rule 65(c), Federal Rules of Civil Procedure, conditions the granting of preliminary injunctive relief upon posting of security by the movant, the amount of such security is in the discretion of the court and the court may elect to require no security. Corrigan Dispatch Co. v. Casa Guzman, S.A., 569 F. 2d 300, 302-03 (1978). Defendants have not requested a bond, nor is it

apparent that they will be prejudiced in any manner if plaintiffs are not required to post a bond.

In accordance with the foregoing, it is

ORDERED AND ADJUDGED that plaintiffs' application for preliminary injunction be, and the same hereby is GRANTED, and defendants are hereby enjoined from enforcing the provisions of Florida Statutes §106.08(1)(e) against plaintiffs during the pendency of this litigation.

DONE AND ORDERED this 5th day of March, 1979.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

FOOTNOTES FOLLOW

FOOTNOTES Dade Voters For A Free Choice v. Firestone TCA 79-0770

1. Plaintiffs' complaint also challenges the constitutionality of the reporting and disclosure requirements contained in Florida Statutes §106.07. Plaintiffs have indicated, however, that they seek no preliminary injunctive relief as to these issues.

2. In addition, the undisputed evidence presented at the hearing establishes that Dade Voters For A Free Choice has already received the following contributions in excess of the amount set by Florida Statutes §106.08(1)(e):

Brown & Williamson Tobacco Corp.	$25,000.00
R. J. Reynolds Tobacco Co.	$47,000.00
Loew's Clearing Corp.	$12,000.00
Philip Morris, Inc.	$60,000.00

See Joint Exhibits 2 and 3.

3. The court cannot concur with defendants' contention that the particular factual situation was crucial to the holding in Let's Help Florida. The issues presented are precisely the same, and defendants' attempt to distinguish Let's Help Florida on the facts is unpersuasive. In addition, the sole governmental interest advanced by defendants here which was not relied on by the defendants in Let's Help Florida - prevention of the perpetration of a

"ruse" upon Dade County voters by out-of-state corporate interest -- cannot withstand constitutional analysis. Defendants argue:

> Defendants submit to this Court that the complete discortion in the presentation of opposition to the [proposed ordinance] to the voters of Dade County is enough to justify the regulation. By organizing as a committee named Dade Voters and pumping huge amounts of funds into a slick advertising campaign, a few companies may be able to convince the populace that their inexhaustable financial reserves are really a groundswell of popular opposition. No longer do the people have control of the system, or can they adequately compete in it. The smaller geographic region, the reasonable limitation involved and the factual consequences presented are valid enough to meet the compelling state interest in this case.

Any concern the State of Florida may have that the voters will be deceived about the identity of the opponents or proponents of an issue is amply served by other statutory provisions requiring public disclosure of the sources of any

contributions. As this court has previously stated, "a contribution ceiling has no relationship to disclosure, while at the same time limiting important associat onal freedoms which are worthy of protection." Let's Help Florida v. Smathers, 453 F.Supp. at 1012.

Defendants also appear to suggest that the State of Florida ought to have the constitutional authority to control the expenditure of large amounts of money by corporate interests in order to "equalize" the arguments on both sides of an issue. This contention must be rejected. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978), quoting Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTICT OF
FLORIDA TALLAHASSEE DIVISION

LET'S HELP FLORIDA, a
Political Committee and
PAUL M. BRUUN,

Plaintiffs,

vs. TCA 78-0750

BRUCE SMATHERS, as Secretary ORDER
of the State of Florida, et al.,

Defendants.

In this action for declaratory and injunctive relief plaintiffs challenge the constitutionality of certain portions of Florida's campaign finance act, Fla. Stat. §106.011 et seq., as amended, Laws of Fla. Ch. 77-175 (1977). Plaintiff Let's Help Florida is a political committee organized and registered pursuant to section 106.03 of the act for the purpose of placing on the November, 1978 general election ballot

a proposal to amend Art. 10§7 of the Florida Constitution, and securing passage of the amendment. Plaintiff Paul M. Bruun is an individual desirous of contributing money in support of the efforts of Let's Help Florida. Defendants are the officials of the State of Florida who are charged with the responsibility of enforcing the campaign financing laws. Presently pending is plaintiffs' application for a preliminary injunction. A hearing was held on March 8, 1978.

Plaintiffs' primary attack[1] is upon Fla. Stat. §106.08(1)(d), which provides:

> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> * * *

> (d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000.00

It is claimed that this restriction impinges on First Amendment guarantees made applicable to the states by the Fourteenth Amendment to the United States Constitution and its enforcement should therefore be enjoined.

In passing on a request for such extraordinary relief this court is constrained to exercise its discretion in accordance with the four-pronged test enunciated by the United States Court of Appeals for the Fifth Circuit. Thus, before a preliminary injunction may be issued it must be demonstrated (1) that there exists a substantial likelihood that plaintiffs will prevail on the merits of the action, (2) that there is

a substantial threat that plaintiff will suffer irreparable injury absent the injunction, (3) that this threatened injury outweighs any potential or threatened harm to defendants, and (4) that such injunction will not disserve the public interest. Canal Authority of State of Florida v. Calloway, 489 F.2d 567, 572 (5th Cir. 1974).

I. Likelihood of Success on the Merits

As noted above, plaintiffs' main constitutional challenge is directed at the $3,000 ceiling on contributions to political committees for the purpose of supporting or opposing an issue which may appear on the ballot in a statewide election. It is beyond question that in thus limiting contributions the statute abridges First Amendment freedoms of political association and,

perhaps to a lesser degree,[2] political expression. Although not absolute, these rights have been recognized as fundamental to our democratic system, and therefore any curtailing governmental activity is subject to strict judicial scrutiny. NAACP v. Alabama, 357 U.S. 449 (1958). Intrusions may be permitted only when the state demonstrates a legitimate and sufficiently compelling interest in the regulation, and the means utilized to promote this interest are calculated to avoid unnecessary interference with these protected rights. Buckley v. Valeo, 424 U.S. 1 (1976). Moreover, the benefits derived from the regulation must clearly "outweigh the loss of constitutionally protected rights." Elrod v. Burns, 427 U.S. 347, 363 (1976) (footnote omitted).

A. Buckley v. Valeo

Although not dealing with the identical issues involved in this case, the decision of the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976) is instructive. In that case the Court was asked to invalidate, primarily on First Amendment grounds, limitations on campaign contributions and expenditures in federal elections.[3] The federal law generally sought to impose restrictions on the amount individuals and groups could contribute to candidates and authorized campaign committees as well as a limitation on the total amount which could be contributed during any calendar year. Additionally, expenditures during a calendar year which were made relative to a clearly identified candidate were limited.

As to the campaign contributions the Court found that although such ceilings constituted restraints on rights of association and expression, the governmental interest in preventing corruption and the appearance of corruption brought about by large contributions to candidates was sufficient to justify the limitations. The Court specifically noted the dangers involved in large contributions being given to secure quid pro quo arrangements from current and potential office holders, Buckley, supra at 26-27, but found it unnecessary to discuss other possible government interests in the limitations.

The expenditure limitations, however, were on a different footing. Determining that these ceilings constituted "direct and substantial restraints on the

quantity of political speech," Buckley, supra at 39, the Court was unable to conclude that the interests which served to sustain the contribution limitations had equal application to expenditure limits. The Court found that the limitations were not sufficiently related to the elimination of corruptive influences for the reason that only some large independent expenditures were limited.

As if reading through different glasses, both sides cite Buckley as supportive of their respective positions. Plaintiffs claim that the ceilings contained in section 106.08(1)(d) are in fact limitations on expenditures regardless of the fact that the term "contributions" is used, and under the Buckley ratonale such constraints are impermissible. Defendants, on the other hand,

argue that the ceilings in the statute seek only to regulate contributions much in the manner of the federal act and that there are no "expenditure" limitations contained in the Florida law. Contribution ceilings, they claim have been sustained by Buckley. The court is of the opinion that whether the ceilings are characterized as regulating "contributions" or "expenditures", Buckley offers little comfort to defendants. Buckley does not stand for the proposition that contributions may always be regulated and expenditures may not. Rather, the language of the opinion indicates that under long established constitutional precepts such regulation passes muster only where demonstrated interests of sufficient magnitude are present and the regulation relates to those interests. A

close examination of the interests asserted by defendants indicates that the statute here misses the mark.

B. Compelling State Interest

The first interest alleged by defendants to be served by section 106.08(1)(d) is the avoidance of impropriety and the appearance thereof. While there can be little doubt this rationale would serve to justify limitations on contributions to candidates for political office, the court is hard pressed to understand how such an interest is served by limitations on contributions to political committees for the purpose of supporting or opposing an issue. The potential for corruption in this setting is not readily apparent. The task becomes more difficult when one realizes that an individual who acts alone may spend unlimited sums to support

or oppose an issue, but that same individual may not contribute in excess of $3,000 to an organized political committee espousing the same views in a statewide election. Indeed, there is no limit on what the committee itself may expend save that imposed indirectly by the contribution ceilings. Surely if there is a danger of corruption and undue influence connected with elections relating to issues that danger does not disappear merely because an individual who wishes to spend large sums must do so alone. It is clear, therefore, that this interest in avoiding corruption and undue influence, however, compelling it may be, cannot sustain this regulation because the statute is not sufficiently related to elimination of these evils.

The other interest advanced by defendants as being promoted by this statute appears to relate to equalization of the "political clout" of individuals acting in a collective capacity. If such an attempt at equalization is a permissible objective, the statute is clearly counterproductive. Far from any equalization, section 106.08(1)(d) serves only to stifle effective political expression by limiting the ability of those with limited resources to combine to voice their opinions. Yet, the statute is silent as to the amount those with unlimited resources may expend individually to promote their view. Accordingly, this rationale is likewise insufficient.

Since there presently appears to be no compelling state interest in the

contribution limitations contained in section 106.08(1)(d), and that section clearly impinges on First Amendment freedoms, plaintiffs have demonstrated a substantial likelihood of prevailing on the merits of this action.

Balance of Injuries and Disserving Public Interest

Having determined that this case involves a deprivation of First Amendment rights the element of irreparable harm to plaintiffs is established. As noted by the Supreme Court, the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Conversely, the court perceives no harm to defendants in enjoining enforcement of the questioned provision of the statute. Removal of the contribution limitation

as it related to political committees supporting or opposing an issue in a statewide election does not appear to pose any significant threat to the integrity of Florida's election process. Defendants have come forth with no interest served by this statute which would be harmed by a preliminary injunction and elimination of these ceilings may aid in enhancing public awareness of the issues to be decided in the November election. Consequently, the balance of potential harm tips heavily in favor of plaintiffs' First Amendment rights.

Likewise, the public interest cannot be disserved by allowing unfettered discussion of important issues by promoting the ability of small groups to be effectively heard in the political arena. This is particularly true in a

case such as this where there appears to be an absence of any interest sufficiently compelling which has the proper nexus to this statute.

Conclusion

Thus, plaintiffs have established the necessary prerequisites to a preliminary injunction. Rule 65(c), Fed.R.Civ. P., provides:

> Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

Although this rule conditions the granting injunctive relief upon posting of security by the movant, the amount of such security is in the discretion of

the court and the court may elect to require no security. Corrigan Dispatch Co. v. Casa Guzman, S. A., _____F.2d ____ (5th Cir. 1978). Defendants have neither asked for nor shown the necessity for such a bond and none will be required in this case. In view of the foregoing, it is hereby

ORDERED that defendants are enjoined from enforcing Fla. Stat. §106.08 (1)(d) during the pendency of this litigation.

DONE AND ORDERED this 29th day of March, 1978.

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

FOOTNOTES FOLLOW

FOOTNOTES

1. In the complaint plaintiffs also challenge the constitutionality of the reporting and disclosure requirements contained in Fla. Stat. §106.08.

However, in the memorandum in support of the application for preliminary injunction and at the hearing on that application plaintiffs indicated that they intend to fully comply with those requirements regardless of the outcome of this suit. This action has the effect of making this part of plaintiffs' claim moot and no discussion of its merits is necessary.

2. In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court noted that:

> [A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributors's ability to engage in free communication.
>
> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support....
>
> Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic effect on the funding of campaigns and political

> associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons. . .

id. at 20-22 (footnotes omitted). While it may be true that the quantity of communication would not increase with the size of a contribution to a political candidate in an election in which numerous issues are normally addressed, it is not altogether clear that the same result would follow in an election which is to be accepted or rejected by the voters.

3. The lengthy and comprehensive opinion of the Supreme Court dealt with many aspects of the Federal Election Campaign Act which were under attack by the plaintiffs. However, the portions of the opinion covering only the contribution and expenditure limitations are of particular relevance to this case.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 79-2091

D.C. Docket No. TCA 79-0770

DADE VOTERS FOR A FREE CHOICE,
a political committee, and
the FLORIDA RESTAURANT ASSOCIATION,
INC.,

Plaintiffs-Appellees,

vs.

GEORGE FIRESTONE, Secretary of
State, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

Before THORNBERRY, FRANK M. JOHNSON, JR., and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby affirmed.

It is further ordered that Defendants-Appellants pay to Plaintiffs-Apellees the costs on appeal to be taxed by the clerk of this court.

July 11, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2497
79-2091

LET'S HELP FLORIDA, a Political Committee, and Paul M. Bruun, Plaintiffs-Appellees,

v.

Jesse M. McCRARY, Jr., as Secretary of State of Florida, et al., Defendants-Appellants.

DADE VOTERS FOR A FREE CHOICE, a Political Committee, and the Florida Restaurant Association, Inc., Plaintiffs-Appellees,

v.

George FIRESTONE, Secretary of State of Florida, et al., Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING

(September 10, 1980)

Before THORNBERRY, FRANK M. JOHNSON, JR. and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

FRANK M. JOHNSON, JR.
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CASE NO. 79-2091

DADE VOTERS FOR A FREE CHOICE, a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,

Plaintiffs-Appellees,

vs.

GEORGE FIRESTONE, Secretary of State, State of Florida; ELIZABETH B. CASTER, Director of Division of Elections, State of Florida, and WALLACE KING, Chairman of Florida Elections Commission, ANNE E. KELLY, JAMES W. MATTHEWS, BENJAMIN A. JOHNSON, HELEN K. LESLIE, JAMES McKILLIPS, and ROBERT J. HUCKSHORN, Members of the Florida Elections Commission,

Defendants-Appellants.

NOTICE OF INVOCATION OF CERTIORARI JURISDICTION

NOTICE IS HEREBY GIVEN that Defendants-Appellants in the above cause invoke the certiorari jurisdiction of the United States Supreme Court from the judgment and opinion filed July 11,

1980, rehearing denied September 10, 1980.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1980

GEORGE FIRESTONE, Secretary of State, State of Florida; DOROTHY GLISSON, Director of Division of Elections, State of Florida, ROBERT HART, Chairman of Florida Elections Commission, ANNE E. KELLY, ROBERT H. HUCKSHORN, SAMUEL SHORESTIN and FLORENCE NEIDIG, Members of the Florida Elections Commission,
Petitioners,

vs.

DADE VOTERS FOR A FREE CHOICE a Political Committee and THE FLORIDA RESTAURANT ASSOCIATION, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CORRECT WHILE THE CONFLICTING CALIFORNIA STATE COURT DECISION DEPARTS FROM SETTLED CONSTITUTIONAL PRINCIPLES.

II.

WHETHER THE LEGAL RATIONALE OF THE COURT OF APPEALS IN REJECTING THE "CASE OR CONTROVERSY" AND ABSTENTION ARGUMENTS ADVANCED IS CONSISTENT WITH OTHER DECISIONS AND IS IN ACCORD WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

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STATEMENT OF THE CASE

The statement of the case contained within the Petition for Certiorari is essentially correct. However, the statement is misleading to the extent that it minimizes the extent of the controversy that existed between the State and the respondents and fails to fully portray the role the petitioners perform in enforcing Florida's election code. These facts are pertinent to the petitioners' arguments concerning case or controversy and abstention, in view of their insistence that no actual controversy existed because a state attorney was not named as a defendant.

Under Florida law, the Secretary of State is designated as the chief election officer, and, together with the Division of Elections and the Florida Elections Commission, is responsible for obtaining and maintaining uniformity in the application, operation and interpretation of election laws including investigation and determination of apparent or alleged violations of the Election Code.[1] Violation of Section 106.08, Florida Statutes, the invalidated contribution limitation, subjected an offender to public censure, civil and criminal penalties.[2]

Prior to instituting suit, the respondents sought to convince the state election officials that the decision previously reached in *Let's Help Florida v. Smathers*, 453 F. Supp. 1003 (N.D. Fla. 1978),[3] was controlling, and that the State should forbear from enforcing contribution limitations in countywide campaigns as well as in all statewide campaigns. The state officials refused the plaintiff's

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1. The election law duties of the Secretary of State, petitioner Firestone, are recited in Section 97.012, Florida Statutes. Petitioner Glisson heads the Division of Elections and the other petitioners comprise the Florida Elections Commission. The duties of the Division and the Commission in enforcing the challenged statute and receiving, investigation and making determinations pertaining to alleged or apparent violation of the statute are recited in Sections 106.22-106.27, Florida Statutes.

2. The Elections Commission is empowered to levy a civil penalty of $1,000 per violation of the election code. §106.265, Fla. Stat. Criminal violation is punishable by a $1,000 fine and imprisonment up to one year, §106.19(1), Fla. Stat. The Commission is obligated to issue a public report concerning its determination of violation, §106.12, Fla. Stat., and is authorized to institute a civil proceeding to recover three times the amount of any illegal contribution which exceeds a contribution limitation, §106.19(2), Fla. Stat.

3. The District Court decision in *Let's Help Florida* was issued in May, 1978 and invalidated the $3,000 contribution limitation pertaining to statewide referenda campaigns. In February, 1979 confronted with the $1,000 contribution limitation contained within the same statute pertaining to countywide campaigns, the respondents sought to convince the state that *Let's Help Florida* controlled and the statute should not be enforced. When the efforts proved unsuccessful suit was filed. The cases were consolidated on appeal.

request, and announced an intention to enforce the county-wide limitations pertaining to issue elections.

As noted by the Court of Appeals, the position of the state election officials was expressly stated to the district judge at the hearing on the application for preliminary injunction:

> Mr. Labasky:[4] . . . And basically that's the reason we are here today, because they have done it, and obviously the State must, at least, until enjoined, must begin to take its action.
>
> The Court: Has any action been taken?
>
> Mr. Labasky: Only to this point, Your Honor. Obviously we have just received the reports with respect to the statements that contribution limitations have been exceeded.
>
> The Court: But to put it to you another way, is there any ongoing State proceedings concerning this particular election or the committee, Dade Voters for Free Choice, Inc.?
>
> Mr. Labasky: Enforcement activity, Your Honor?
>
> The Court: Yes.
>
> Mr. Labasky: To my knowledge not at this point in time. But in the event that the injunction is found not to be warranted, there is the—the State would be compelled to begin those proceedings. (Record, Vol. III, at 41-42).

Thus, at the time of institution of the action in the District Court there was no pending state proceeding but threat of enforcement was real and immediate.

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4. Ronald Labasky appeared as counsel for the members of the Florida Elections Commission. His argument was adopted by the other defendants (Record, Vol. III, at 42).

SUMMARY OF ARGUMENT

In seeking certiorari review, the petitioners rely upon conflict between the decision of the Court of Appeals for the Fifth Circuit and a recent decision of the California Supreme Court. However, it is apparent that the decision of the Court of Appeals is correct while the state court decision departs from settled constitutional principles.

The conclusion reached by the Fifth Circuit was mandated by direct application of principles set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

The California state court decision on the other hand, is incompatible with principles expressly stated in those decisions. The state court incorrectly determined that government has a legitimate interest in equalizing the relative ability of individuals and groups to seek to influence the outcome of an election. Such a view intolerably places government in control of the quantity and range of debate on public issues in a political campaign and is therefore prohibited by the First Amendment.

The case or controversy and abstention arguments raised by the petitioners are of no merit whatsoever and do not warrant the attention of the Court.

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

The Decision of the Court of Appeals for the Fifth Circuit Is Correct While the Conflicting California State Court Decision Departs From Settled Constitutional Principles.

It is not reasonable to argue that the decision of the Court of Appeals for the Fifth Circuit and the decision of the California Supreme Court in *Citizens Against Rent Control v. City of Berkeley*, 614 P.2d 742 (1980) are not in conflict. No significant distinction is apparent between the Florida Statute invalidated by the Federal Courts and the municipal ordinance upheld by the California state court.

Nevertheless, because of the lack of any serious question concerning the correctness of the Fifth Circuit decision there is not sufficient reason for the Court to review the decision on writ of certiorari.

The decision of the Court of Appeals is consistent with this Court's decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Court of Appeals correctly applied principles directly enunciated in those cases.[5]

The conclusion reached by the Fifth Circuit was mandated by subjecting justifications for the statute to First Amendment analysis within the framework of principles outlined in *Buckley* and *Bellotti*.

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5. These principles have been similarly applied by the Court of Appeals for the Second and Ninth Circuits. *See, Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978).

The Court in *Buckley* upheld the Federal campaign act's $1,000 limitation upon contributions to candidates only upon determination that the actuality and appearance of corruption through possible expectancy of a *quid pro quo* was a constitutionally sufficient justification. *Buckley v. Valeo, supra* at 26. No other governmental interest in requiring contribution limitations met constitutional muster.[6]

In *Bellotti*, the Court held that the compelling interest in curtailing corruption was not existent in an issue campaign because there was no possibility of *quid pro quo* in the absence of a candidate:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. 435 U.S. at 790.

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6. Two other holdings in *Buckley* also demonstrate the narrow scope of the governmental interest in limiting contributions.

The Court invalidated the $1,000 expenditure limitation imposed upon independent expenditures relative to a clearly identified candidate. The Court did not consider large independent expenditures to offer the same danger of real or apparent corruption as contributions to a candidate, *Id.* at 46. The Court concluded that "[w]hile the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression." *Id.* at 47-8. In invalidating the provision, the Court rejected the contention that the limitation was justified by a governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. *Id.*

Moreover, in considering the disclosure requirement of the federal act, applicable to persons making contributions "'for the purpose of . . . influencing' an election or nomination" the Court noted that the language in question had a potential for "encompassing both issue discussion and advocacy of a political result . . . and could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. To insure that the reach of the provision was "not impermissibly broad" the Court construed the language to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *Id.* at 80.

As the Court of Appeals correctly held, this Court in *Buckley* and *Bellotti* identified the only governmental interest sufficient to sustain a contribution limitation and determined that such an interest has no application in a referenda campaign.

On the other hand, the California decision cannot be reconciled with the analytical framework set forth in *Buckley* and *Bellotti*. The consideration which led the California court to sustain the Berkeley ordinance is incompatible with the First Amendment.

The point where the California court departs from the holdings of this Court, followed by the Fifth, Second[7] and Ninth Circuits,[8] is in its erroneous determination that government has a legitimate and compelling interest in equalizing the relative ability of individuals or groups to seek to influence the outcome of an election. The California court was misled by its well intentioned but dangerous concern that "domination of these [referendum] processes by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will." *Citizens Against Rent Control v. City of Berkeley, supra* at 746.

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7. "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights." *Schwartz v. Romnes, supra* at 852-3.

8. "The state interest in preventing corruption of officials which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. When corporations seek to influence the electorate and not an individual candidate or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in *Buckley*. That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech." *C & C Plywood Corp. v. Hanson, supra* at 425. (Citations omitted.)

The state court appears to accept the proposition that powerful presentation of an idea deprives the electorate of the ability to reach informed judgment:

> When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests.[9] 614 P.2d at 746.

Relying upon "commentators on our political scene," a "student of the California initiative process," and a Colorado "political scientist" rather than any evidence in the record, the state court adopted the view that the electorate required protection from initiative campaigning:

> The majority of people were interested in the issues and did have ideas on them. But on several proposals their ideas tended to reflect the latest polling techniques, campaign strategies and gimmicks of those with the most power and money. 614 P.2d at 747.

Undaunted by the spectre of government being empowered to decide which campaign activities involve "strategies and gimmicks", the California court upheld the Berkeley ordinance, determining that it served a compelling governmental interest by seeking "to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote

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9. Such a conclusion has obvious implications that reach far beyond contribution limitations upon referenda campaigns. Powerful voices, such as those of newspaper and television editors, public officials, civic and religious leaders, and entertainers are heard on many matters of public debate. Do these powerful voices "overcome the power of reason" and require limitation?

and their participation, whether in the form of money or services, are significant." *Id.* at 747-8.

The Fifth Circuit, relying on pronouncements of this Court, rejected similar arguments advanced by the State of Florida, that a contribution limitation operates to protect the electorate from "slick advertising campaigns" financed by "huge amounts of funds" from "inexhaustible reserves." As the Fifth Circuit noted, this Court has held that such considerations are barred by the First Amendment:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution it is not government but the people—individually as citizens and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment. *Buckley v. Valeo, supra* at 48-9, 57; *First National Bank of Boston v. Bellotti, supra* at 791-2.

The highly paternalistic view of the California court, rejected by the Fifth Circuit, that government must protect the citizen from being misled by sophisticated or

well financed presentation of ideas[10] presents a serious threat to democracy. For as Justice Jackson stated in *Thomas v. Collins*, 323 U.S. 516, 545 (concurring opinion) (1945):

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

The correctness of the Fifth Circuit in applying this well-settled principle of constitutional law provides sufficient basis for denial of the petition for certiorari.

II.

The Legal Rationale of the Court of Appeals in Rejecting the "Case or Controversy" and Abstention Arguments Advanced Does Not Conflict With Other Decisions and Is in Accord With the Accepted and Usual Course of Judicial Proceedings.

The "case or controversy" and abstention arguments urged by the petitioners offer no reason whatsoever for exercise of certiorari jurisdiction. In determining these issues, raised for the first time on appeal, the Court of Appeals correctly applied existing law.

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10. In *Bellotti*, in rejecting the state's argument that the prohibition upon corporate contributions to a referenda campaign should be sustained because "corporations are wealthy and powerful and their views may drown out other points of view," the Court stated: "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Id.* at 790. (Citations omitted.)

The test applied by the Court of Appeals to determine the existence of a case or controversy was taken directly from decisions of this Court. The petitioners do not contend that an improper standard was utilized but appear to argue that the Court of Appeals erred in applying the standard to the facts of the case. No conflict of law having potential to affect future cases is alleged and therefore the matter would not merit this Court's attention through certiorari review even if the Fifth Circuit's determination were incorrect.

However, it is apparent that the Fifth Circuit correctly applied the legal standard. As the Court of Appeals noted, the petitioners have the statutory duty to enforce the election code and indicated an intention to do so.[11] The respondents desired to engage in activity directly proscribed by the statute in question. The committee had already received a few contributions larger than the statutory maximum, and other potential donors, including the co-respondent in this case, indicated they would make larger contributions if the law allowed them to do so. The election was only weeks away. A more imminent or concrete controversy is difficult to imagine.

The petitioners' abstention arguments are even more difficult to comprehend. The petitioners fail to offer any authority for application of abstention, much less demonstrate any reason for this Court to consider the matter by certiorari.

As this Court has noted, abstention from the exercise of federal jurisdiction " '. . . is an extraordinary and nar-

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11. The petitioners insist that since a state attorney was not named as a defendant there can be no case or controversy. This argument ignores, however, the primary role played by the Secretary of State, Division of Elections, and Election Commission in both the civil and criminal enforcement of the Election Code. *See,* FLA. STAT. ANN. §§106.22-106.27 (West).

row exception to the duty of a District Court to adjudicate a controversy properly before it'." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). The relevant principles of comity and federalism upon which *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny are based "have little force in the absence of a pending state proceeding." *Lake Carriers' Assoc. v. MacMullan*, 406 U.S. 498, 509 (1972), cited in *Steffel v. Thompson*, 415 U.S. 452, 462 (1973). In the absence of a state proceeding, a plaintiff may challenge the constitutionality of a state statute in federal court, assuming the requirements for federal jurisdiction are satisfied. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975). The Court of Appeals correctly applied these principles in rejecting the petitioners' request for abstention.

CONCLUSION

As set forth above, in view of the correctness of the decision of the Court of Appeals for the Fifth Circuit, the respondents respectfully request that the petition for Writ of Certiorari be denied. The Court may, however, wish to consider summary reversal or notation of probable jurisdiction in the appeal of the California Supreme Court decision in *Citizens Against Rent Control v. City of Berkeley, supra* (No. 80-737, Appeal docketed November 5, 1980), because of that decision's departure from decisions of this Court and conflict with decisions of the Courts of Appeal for the Second, Fifth and Ninth Circuit.

Respectfully submitted,

DONALD M. MIDDLEBROOKS
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STEVEN J. UHLFELDER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed, postage prepaid, by U.S. mail this 26th day of January, 1981 to Anthony C. Musto, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

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